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THE AYER MOLEK RUBBER COMPANY BHD

v.

BINTANG-BINTANG SDN BHD & ORS

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HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG J
[CIVIL SUIT NO: 22-217-2009]
28 MAY 2012

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LAND LAW: *Sale of land - Indefeasibility of title - Sale of land by plaintiff after presentation of winding up petition - Whether sale effected by fraud, dishonesty and conspiracy - Whether existence of conspiracy proven - Whether fraud proven beyond reasonable doubt - Whether sale price of land undervalued - Whether first defendant acted in good faith for valuable consideration - Whether shareholders' resolution required for sale of land - Royal British Bank v. Turquand*

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COMPANY LAW: *Winding up - Stay order, permanent - Effect of - Transfer of land effected after presentation of winding up petition - Whether impugned events that took place after presentation of winding up petition illegal, null and void - Companies Act 1965, s. 223*

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The plaintiff, a public listed company, was the registered proprietor of one lot of oil palm land situated in Johor ('the land'). On 4 January 2006, a winding up petition had been filed against the plaintiff company. On 13 April 2006, a winding up order had been made against the plaintiff but on 17 May 2006, the court had ordered a stay of the winding up order. However, on 21 September 2007, the Court of Appeal set aside the stay order. By order of court dated 8 August 2008, a permanent stay of the winding up order was recorded by consent. In the meantime, on 12 April 2006, the plaintiff had entered into a sale and purchase agreement ('the SPA') for the sale of the land to the first defendant for a consideration of RM12,087,000. The transfer of the land in favour of the first defendant was registered on 27 June 2006. The plaintiff claimed that the sale and purchase of the land to the first defendant was effected by fraud, dishonesty and conspiracy of the first to the seventh defendants. The second to the fifth defendants were at all material times the directors of the plaintiff company, while the sixth defendant company was appointed by the plaintiff

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as the sales agent for the land. By way of this action, the plaintiff prayed, *inter alia,* for (i) an order to cancel the Memorandum of Transfer ('the MOT') in respect of the land and to replace the name of the plaintiff as the proprietor of the land; (ii) an order that the first defendant transfer the land to the plaintiff; (iii) an order that the sixth defendant refund to the plaintiff all the monies it had collected by way of commission and payments with interest. In its defence, the first defendant submitted that the sale and purchase of the land was done in the normal course of transaction for valuable consideration between a willing buyer and willing seller. The first defendant also averred that it had not wrongfully, dishonestly or fraudulently conspired with the other defendants to cheat and defraud the plaintiff and put the plaintiff to strict proof with regard to its allegation of fraud. However, the first defendant counterclaimed against the plaintiff for the refund of the full purchase price with interest and damages in the event the plaintiff succeeded in setting aside the transfer of the land. The fourth and fifth defendants claimed that as non-executive directors of the plaintiff, they had no knowledge of the disposal of the land by the plaintiff to the first defendant. The seventh defendant, the firm of solicitors that acted for the first defendant in respect of the sale and purchase transaction, claimed that it had at all material times throughout the transaction acted professionally and used reasonable care and skill consistent with its responsibility as competent solicitors. During the trial, the plaintiff highlighted a conspiracy or scheme between the first, second and sixth defendants whereby part of the purchase price was diverted so that the monies could be taken by all interested parties. The plaintiff submitted that this was the second defendant's deliberate act to strip the company's assets before these could be garnished or seized by the plaintiff's creditors who had filed suits against the plaintiff. The plaintiff further submitted that the sixth defendant was paid RM362,610 as commission even though it had not performed any real estate booking services for the plaintiff company. It was also part of the plaintiff's case that the events that took place after the winding up petition was presented against the plaintiff company, *ie*, as from 4 January 2006, were unlawful, null and void.

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Held (allowing claim against the first defendant with costs; dismissing claim against the second to seventh defendants with costs; allowing first defendant's counterclaim in part):

(1) In order to render an indefeasible title defeasible, it was necessary for the plaintiff to prove actual fraud, and not constructive or equitable fraud, beyond reasonable doubt. On the facts, it was not satisfactorily proven that the sale price of the land to the first defendant was undervalued. There was also no evidence of any agreement between the defendants to carry out the alleged fraud. Although the events which transpired between the parties did not appear to have been entirely straight forward, these events did not play any part in the fraud alleged. In the premises, the charge of fraud and conspiracy had not been made out beyond reasonable doubt. (paras 60, 76, 77 & 82)

(2) The fourth and fifth defendants were independent non-executive directors of the plaintiff company who signed the resolution to ratify the SPA in good faith. These two defendants were also candid, credible and consistent in their testimonies. Hence, the claims against the fourth and fifth defendants were dismissed. (paras 75 & 91)

(3) The SPA that was duly executed by the second and third defendants as officers of the plaintiff was ratified by the plaintiff when it duly passed the board resolution to ratify the SPA. As the first defendant had been dealing in good faith for valuable consideration, the fact that the SPA and the transfer of the land to the first defendant was transacted without the plaintiff's shareholders' approval in a general meeting could not be sustained. Further, it is settled law that persons dealing with a company in good faith need not inquire into the internal workings of a company. As the general rule in *Royal British Bank v. Turquand* applied to this case, it did not fall upon the first or seventh defendants to inquire into the internal workings of the plaintiff company. The first and seventh defendants were at all material times dealing with the second defendant, who was the managing director of the plaintiff, and the plaintiff's solicitors. Thus, they were entitled to rely upon the plaintiff's letter of confirmation and undertaking that no shareholders' resolution was required for the sale of the land to the first defendant. (paras 78-81)

(4) As a consequence of the permanent stay order dated 8 August 2008, the plaintiff could carry on its business activities and operations as if no winding up order existed. However, a stay order only becomes operative from the date it is made, *ie*, it has no retrospective effect. Accordingly, the effect of the permanent stay order was that from 8 August 2008 onwards, the plaintiff could carry on its business and operations as if no winding up order existed. As such, the permanent stay order did not relate to the impugned events, which transpired before 8 August 2008. Consequently, the SPA and the transfer of the land to the first defendant were illegal, null and void under s. 223 of the Companies Act 1965 having been effected during the period after the presentation of the winding up petition and after the winding up order had been made. As such, the transfer of the land to the first defendant was invalid and of no effect subject to the full refund of the purchase price by the plaintiff to the first defendant. (paras 89 & 90)

(5) The first defendant was entitled to a full refund of the purchase price from the plaintiff. It was also entitled to such amounts it had expended in improving the value and infrastructure of the land. (para 91)

Case(s) referred to:

Abrath v. North Eastern Railway Co [1883] 11 QBD 440 ***(refd)***

American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd [2012] 1 CLJ 506 CA ***(refd)***

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC ***(refd)***

Assets Co Ltd v. Mere Roihi [1905] AC 176 ***(refd)***

Brinds Ltd v. Offshore Oil NL (No. 2) [1985] 10 ACLR 232 ***(refd)***

Chan Thiam Teng v. Ban Swee Heng Sdn Bhd [1992] 1 LNS 37 HC ***(refd)***

Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134 FC ***(refd)***

Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 1 LNS 21 FC ***(refd)***

Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd; Soo Yuh Mian (Intervener) [2011] 3 CLJ 16 CA ***(refd)***

Goh Hooi Yin v. Lim Teong Ghee & Ors [1990] 2 CLJ 203; [1990] 2 CLJ (Rep) 48 HC ***(refd)***

Inai Offshore & Marine Engineering Sdn Bhd v. Abdul Jalal Khalid [2012] 2 CLJ 239 HC ***(refd)***

Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253 HC ***(refd)***

Kredin Sdn Bhd v. Development & Commercial Bank Berhad [1995] 4 CLJ 18 CA ***(refd)***
Loke Yew v. Port Swettenham Rubber Co Ltd [1913] AC 491 ***(refd)***
Ong Ban Chai v. Seah Siang Mong [1998] 3 CLJ 637 CA ***(refd)***
Oversea-Chinese Banking Corp Ltd v. Lee Tan Hwa & Anor & Another Case [1989] 1 CLJ 458; [1989] 2 CLJ (Rep) 198 HC ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Perwira Habib Bank (M) Bhd v. Bank Bumiputra (M) Bhd [1987] 1 LNS 75 HC ***(refd)***
Quah Kay Tee v. Ong and Co Pte Ltd [1996] 3 SLR(R) 637 ***(refd)***
Ratcliffe v. Watters [1969] 2 NSWR 146 ***(refd)***
Re Baxters Limited [1898] WN 60 ***(refd)***
Re Kim Maxwell Ltd [1992] 1 NZLR 69 ***(foll)***
Robertson v. Keith [1870] 1 VR (E) 11 ***(refd)***
Royal British Bank v. Turquand (1885) 5 E&E 248 ***(foll)***
Schultz v. Corwill Properties Pty Ltd [1969] 2 NSWR 576 ***(refd)***
Selvaduray v. Chinniah [1939] 1 LNS 107 CA ***(refd)***
Tai Lee Finance Co Sdn Bhd v. The Official Assignee Of The Property Of Ngan Kim Yong & Ors [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 FC ***(refd)***
Tan Chiw Thoo v. Tee Kim Kuay [1997] 1 CLJ 541 FC ***(refd)***
Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors [1995] 2 CLJ 392 CA ***(refd)***
Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 20(1), 127, 132C(1), (3), 219, 223, 243(1), 253
Contracts Act 1950, s. 26
Evidence Act 1950, s. 101(1)
National Land Code, ss. 214, 340(1), (2)

Other source(s) referred to:

Cheshire, Fifoot and Furmston's Law of Contract, Butterworths Asia 1998, pp 165, 166
Ford, *Principles of Company Law,* 5th edn, 1990, para 2207, p 770
Prof Visu Sinnadurai, *The Law of Contract in Malaysia And Singapore,* Oxford University Press, p 81

For the plaintiff - S Kandasivam; M/s PG Lim & Co
First the 1st defendant - Wong Kim Fatt (Wong Boon Lee & Wong Boon Chong with him); M/s Gulam & Wong
For the 4th & 5th defendants - Chan Kah Hong; M/s Freddy Chan & Co
For the 7th defendant - Ng Kong Peng; M/s KP Ng & Amardas

Reported by Vani Krishnan

JUDGMENT

Vernon Ong J:

[1] The plaintiff's claim is for a declaration that the sale and purchase agreement under which it transferred one lot of oil palm land in Segamat to the 1st defendant is void *ab initio* and be set aside together with other ancillary relief.

Brief Account Of The Undisputed Facts

[2] The plaintiff is a public listed company. It was the registered proprietor of one lot of oil palm land held under Grant No. 92575 Lot No. 2203 measuring an area of 711 acres situated in the Mukim of Buloh Kasap, District of Segamat, State of Johor ('the land'). The 2nd defendant was at all material times a director of the plaintiff company up to 22 May 2007. The 3rd, 4th and 5th defendants were at all material times the directors of the plaintiff company. The 6th defendant company was appointed by the plaintiff as the sales agent of the land.

[3] On 12 April 2006, a sale and purchase agreement ('the SPA') was entered into between the plaintiff as vendor and the 1st defendant as purchaser for the sale of the land for a consideration of RM12,087,000. The 7th defendant was at all material times the solicitors for the 1st defendant in respect of the sale and purchase transaction. The Johor Estate Land Board gave its approval and issued the certificate under s. 214 of the National Land Code on 25 May 2006. The transfer of the land in favour of the 1st defendant was registered on 27 June 2006. The land was also charged to OCBC Bank to secure a loan to finance the purchase of the land.

[4] A winding-up petition was filed against the plaintiff company on 14 January 2006 and a winding-up order made on 13 April 2006. The winding-up order was stayed by order of court dated 17 May 2006. The Court of Appeal on 21 September 2007 dismissed the plaintiff's appeal against the winding-up order and set aside the stay order. By order of court dated 8 August 2008, a permanent stay of the winding-up order was recorded by consent.

A **The Plaintiff's Case**

[5] The sale and purchase of the land to the 1st defendant was carried out and effected by the fraud, dishonesty and conspiracy of the 1st to 7th defendants. Further, the 2nd, 3rd, 4th and 5th
B defendants were in breach of their fiduciary duties as directors and that the 1st and the 7th defendant knew of the fraud and breach of fiduciary duties or ought to have known of this. Further, the primary fraud was perpetrated by the 1st, 2nd and 6th defendants.

[6] It is also the plaintiff's case that the sale and transfer of the
C land to the 1st defendant was effected during the period after the presentation of a winding-up petition against the plaintiff company and after a winding-up order had been made against the plaintiff company.

D **[7]** Consequently, the plaintiff is claiming for the following:

(a) a declaration that the SPA is void *ab initio* and be set aside;

(b) a declaration that the land was unlawfully and fraudulently transferred to the 1st defendant and the said transfer is invalid
E and of no effect;

(c) a declaration that the Memorandum of Transfer in respect of the land executed by the 2nd and 3rd defendants in favour of the 1st defendant and registered in the Register of Titles on
F 27 June 2006 was fraudulent, null and void and is of no effect;

(d) an order directing the Registrar/Land Administrator, Johor to cancel the Memorandum of Transfer and to replace the name
G of the plaintiff as the proprietor of the land;

(e) an order that the 1st defendant forthwith take all steps necessary to transfer the land to the plaintiff;

(f) an injunction to restrain the 1st defendant or their agents and
H or servants from dealing with the land by way of transfer or in any manner whatsoever;

(g) an order that the 6th defendant refund the plaintiff the sum of RM362,610 commission paid by the plaintiff with interest
I thereon at 8% per annum from 22 April 2006 to date of payment;

(h) an order that the 6th defendant refund/repay the sums of RM40,000 paid on 5 June 2006 and RM150,000 paid on 27 June 2006 with interest on the said sums at 8% per annum from 6 June 2006 and 28 July 2006 respectively;

(i) damages and costs.

The 1st Defendant's Defence

[8] The SPA and the Memorandum of Transfer (MOT) were both executed under the common seal of the plaintiff signed by the 2nd defendant where he was the Group Managing Director of the plaintiff together with the 3rd defendant a director of the plaintiff.

[9] The 1st defendant had paid the full purchase price at the rate of RM17,000 per acre totalling RM12,087,000 to the plaintiff. The payment was effected through the plaintiff's solicitors Messrs. Bahari & Bahari and later to its new solicitors Messrs Abdul Halim & Zairus. The stamp duty of RM356,610 was paid based on the government valuation of RM12,087,000 for the land.

[10] The sale of the land at RM12,087,000 was approved by all the four directors of the plaintiff by way of a Directors' Circular Resolution duly passed on 10 April 2006. The allegation of undervalue by the plaintiff is totally baseless and contrary to s. 26, illustration (f) of the Contracts Act 1950.

[11] There was a letter of undertaking dated 10 July 2006 by the 2nd defendant that no shareholders' resolution or approval was necessary for the sale of the land.

[12] The 1st defendant had no knowledge that the 2nd defendant had resigned on 22 May 2007. The 1st defendant was also unaware whether the 2nd defendant was an undischarged bankrupt when the SPA and the MOT was executed on 12 April 2006 and 29 May 2006 respectively. The 1st defendant had at all material times acted in good faith and has paid valuable consideration to the plaintiff for the land. The 1st defendant is protected by ss. 127 and 20(1) of the Companies Act 1965.

[13] The 1st defendant had no knowledge that the 3rd, 4th and 5th defendants were removed as directors during the Extraordinary General Meeting of the plaintiff on 7 September 2007.

[14] The sale of the land was completed during the time when the stay order dated 17 May 2006 was in force and the permanent stay order was obtained by consent on 8 August 2008. The approval of the Insolvency Department to transact the sale and purchase of the land was obtained *vide* its letter dated 28 April 2006.

[15] The sale and purchase of the land was done in the normal course of transaction for valuable consideration between a willing buyer and willing seller. The 1st defendant denies the allegation of fraud by the plaintiff and puts the plaintiff to strict proof. The 1st defendant had no knowledge that the 2nd, 3rd, 4th and 5th defendants had breached their fiduciary duties of the company. It was not the duty of the 1st defendant to inquire into or examine the internal operation or function of the plaintiff. The 1st defendant never wrongfully, dishonestly or fraudulently conspired or agreed together with the other defendants to cheat and defraud the plaintiff.

[16] The 1st defendant counterclaims against the plaintiff for the refund of the full purchase price of RM12,087,000 with interest and damages in the event that the plaintiff succeeds in its claim in setting aside the transfer of the land.

The 4th & 5th Defendants' Defence

[17] The 4th and 5th defendants were at all material times independent non-executive directors of the plaintiff. They do not have access to the day to day operations of the plaintiff unless the same are brought up in the Board of Directors' Meeting of the plaintiff.

[18] Prior to 10 April 2006, the 4th and 5th defendants have no knowledge of the disposal of the land by the plaintiff to the 1st defendant. On 10 April 2006, the 4th and 5th defendants signed the Directors' Circular Resolution for the proposed sale of the land to the 1st defendant in good faith. They relied on the 2nd defendants' representation that the transaction was at arms' length basis and that the plaintiff required urgent funds to pay its liabilities then and for working capital. They believed that the 2nd and 3rd defendants who took sole and exclusive conduct of the sale of the land would ensure that the sale was legally carried out. After 10 April 2006, the 4th and 5th defendants were no longer involved in the disposal of the land to the 1st defendant.

[19] At a Board of Directors' Meeting on 22 May 2007, the 4th and 5th defendants were informed by the 2nd defendant that the 2nd defendant was not a bankrupt. The 4th and 5th defendants denied any allegations of fraud or breach of fiduciary duties by the plaintiff.

The 7th Defendant's Defence

[20] The sale and purchase transaction between the plaintiff and the 1st defendant was a normal transaction between a willing buyer and willing seller. Both parties were represented and advised by their own solicitors.

[21] The approval of the Johor Land Estate Board for the transfer of the land from the plaintiff to the 1st defendant was obtained on 25 May 2006. The transaction was approved by the plaintiff's Board of Directors resolution dated 10 April 2006. The plaintiff's common seal was affixed onto the SPA and the MOT in accordance with the resolution. By a letter dated 18 July 2006 to the 1st defendant, the plaintiff had confirmed that a resolution of the shareholders was not required. The 7th defendant had no reason to believe that s. 132C(1) of the Companies Act 1965 applies to the sale and purchase transaction. In any event the 7th defendant is protected under s. 132C(3) of the Companies Act 1965. The Insolvency Department *via* a letter dated 28 April 2006 have given their approval and consent to the plaintiff and the 1st defendant to proceed and to complete the sale and purchase transaction.

[22] The 7th defendant has no knowledge and does not have any reason to believe that the 2nd defendant was an undischarged bankrupt at the time he executed the SPA and the MOT. The 7th defendant believed that the 2nd defendant was the Group Managing Director and Chief Operating Officer of the plaintiff company and was authorised to undertake the sale and purchase transaction on behalf of the plaintiff. The 2nd defendant's actions as director of the plaintiff were valid at all material times pursuant to s. 127 of the Companies Act 1965.

[23] As solicitors for the 1st defendant, the 7th defendant is not obliged to investigate or to inquire into the actual value of the land when both the purchaser and the vendor were represented by their own solicitors have agreed to a specific price.

[24] The payment of RM1,991,000 to the 6th defendant was made by the 7th defendant acting as the 1st defendant's solicitors on the 1st defendant's instructions whereby the 2nd defendant under letter dated 3 October 2005 had guaranteed to refund the amount paid in the event that the sale and purchase transaction could not be perfected. All the conditions stated in the 7th defendant's letter dated 16 September 2007 have been fulfilled by the 6th defendant. At all material times throughout the transaction, the 7th defendant had acted professionally, in good faith and had used reasonable care and skill consistent with their responsibilities as competent solicitors.

Overview Of The Evidence

[25] The plaintiff called five witnesses to give evidence: En. Jasmi bin Daik (PW1) a director of the plaintiff company; En. Muhammad Azmi bin Mashud (PW2) a legal officer from the Insolvency Department; Mr. Jagathesan a/l Naganathan (PW3) a consultant to the plaintiff company; Mr. Sukdev Singh a/l Balbir Singh (PW4) an executive director in KPMG Corporate Services Sdn Bhd; and En. Mohd Rizal Bahari (PW5) an advocate and solicitor practising at Messrs Bahari & Bahari. The 1st defendant called two witnesses: Mr. Teoh Leong Seng (DW3) a chartered valuation surveyor with Henry Butcher Malaysia (Johor) Sdn Bhd; and Mr. Khoo Cheng Hai @ Ku Cheng Hai (DW4) the managing director of the 1st defendant company. The 4th defendant Mr. Keow Hoch Sneah (DW1) and the 5th defendant Mr. Low Kok Hwa @ Low Koh Hwa (DW2) respectively testified in their own defence. The 7th defendant called Mr. Leong Fook Leong (DW5) an advocate and solicitor and the sole proprietor of the legal firm.

Evidence Of Plaintiffs' Witnesses

[26] En. Jasmi bin Daik ('Jasmi') was appointed as a director of the plaintiff company on 19 September 2007. The previous Board of Directors (the 3rd, 4th and 5th defendants) were removed by resolutions passed at an EGM of the shareholders on 7 September 2007. As the previous Board of Directors disputed the validity of the EGM and the resolutions removing them the current Board of Directors only took control of the plaintiff company on 16 July 2008. They then appointed KPMG Corporate Services Sdn Bhd ('KPMG') to carry out investigations into the affairs of the company during the tenure of the previous board of

directors. KPMG produced an investigative Review Final Report dated 17 December 2008 ('the KPMG Report') (pp. 783/869 bundle B3). The current directors also discovered that: A

(i) a winding-up petition was presented against the plaintiff company on 4 January 2006 at the Kuala Lumpur High Court and that a winding-up order had been made on 13 April 2006; B

(ii) the SPA was entered into between the plaintiff and the 1st defendant for the sale of the Land;

(ii) the winding-up order had been stayed on 17 May 2006 pending the plaintiff's appeal to the Court of Appeal; C

(iv) pursuant to the SPA the MOT was executed on 29 May 2006; and

(v) on 20 September 2007, the plaintiff's appeal to the Court of Appeal was dismissed, the winding-up order confirmed and the stay order set aside. D

Subsequently, the current board of directors reached a settlement with the petitioner and recorded a consent order of permanent stay of the winding-up order on 8 August 2006. The current board of directors also found that (a) the land had been sold at a grossly under valued price and that the sale price was not paid to the company but to its then solicitors; (b) in January 2007, another lot of oil palm land in Malacca was sold to the 1st defendant at a grossly undervalued price and that the sale price was also not paid to the company but to its then solicitors; and (c) in June 2007, 8 acres of land was transferred to Ropie bin Subari ('Ropie') even though there was no sale and purchase agreement and the alleged sale price was not paid to the company by him. On 29 January 2008, the 3rd defendant applied to lodge a private caveat against the land; in his application form he stated that he had made a report on the disposal of the assets to the Securities Commission and Anti Corruption Agency. As a result, the Securities Commission filed a civil suit against the plaintiff company then under the control of the previous board of directors and obtained injunctive orders on 6 September 2007 to prevent the dissipation of the company's assets. The current board of directors subsequently settled the civil suit with the Securities Commission which was recorded under a consent order dated E F G H I

25 November 2008. Jasmi also produced a bankruptcy search report which showed that the 2nd defendant was a bankrupt when he signed the MOT for the transfer of the land to the 1st defendant. Further, the seal of the plaintiff company on the MOT was not affixed in accordance with art. 126. Jasmi asserts that the sale of the land to the 1st defendant was not effected in the interest of the plaintiff company. It was a fraudulent sale planned and effected by the 2nd defendant with the knowledge and cooperation of the 1st, 6th and 7th defendants. The plaintiff has also initiated legal action against Messrs Abdul Halim & Zairus ('M/s AHZ') the solicitors for the plaintiff company in the sale and purchase transaction with the 1st defendant.

[27] En. Muhammad Azmi bin Mashud ('Azmi') of the Insolvency Department said that the winding-up petition was served on the Official Receiver on 14 January 2006. Azmi was asked why an E-Service Liquidation Search Result from the Insolvency Department dated 24 April 2006 did not show that a winding-up order had been made on 13 April 2006. Azmi explained that according to the SSM records, the plaintiff's name had a full stop symbol after the word 'Bhd'. However, based on the official search made by the 7th defendant the full stop symbol was not stated. Consequently, the system may not have captured the correct information and will give inaccurate results. For the same reasons, the official search result dated 27 April 2006 from the Insolvency Department also stated that there is no winding-up order against the plaintiff company. Azmi also testified that the Insolvency Department did not have any record of a letter (p. 101 bundle C) purportedly written by M/s AHZ to them. Azmi was also shown a letter from the Insolvency Department Wilayah Persekutuan Branch dated 28 April 2006 signed by one 'Suriyati Hasimah bt. Mohd Hashim' addressed to M/s AHZ (p. 105 bundle C) stating that they have no objections to the completion of the sale and purchase transaction of the land. Azmi said that there was no one by that name. There was an officer by the name of Suriyati Hasimah bt. Mohd Hashim who was the Pengarah Insolvensi Negeri from 1 June 2004 and then as Penolong Pengarah Negeri from 27 November 2006. Azmi produced letters signed by Suriyati which showed that the signatures of Suriyati are completely different from that in p. 105 bundle C. Azmi then confirmed that p. 105 bundle C is not a letter from the Insolvency Department.

[28] Mr. Jagathesan a/l Naganathan ('Jagathesan') the consultant testified that the plaintiff did not make a general announcement to Bursa Malaysia and the general public of the sale of the land even though the plaintiff is obliged under the listing requirements. The board of directors were not informed of the intended sale of the land. No board of directors resolution was passed between May and October 2005 for the sale of the land. The board of directors of the plaintiff company did not authorise the appointment of the 6th defendant as the sales agent of the land. According to a valuation report by JAZ International Malaysia Sdn Bhd dated 30 May 2005 ('the JAZ Valuation Report') the valuation of the land was stated as RM19,435 per acre; whereas the 1st defendant only paid RM17,000 per acre which is RM2,435 lower than the valued price per acre.

[29] Jagathesan produced a draft of a letter (p. 98 bundle B1) which was found in the 2nd defendant's table after the current board of directors took over the plaintiff company. The draft letter was purportedly drafted by the 2nd defendant; a handwritten fax number on top of the draft is in the 2nd defendant's handwriting. The draft letter was sent to Ropie (the Assistant Land Administrator, Land Office Segamat at that time) and to the 1st defendant. The 1st defendant copied the letter and sent it to the 6th defendant. In that letter, the 1st defendant gave an undertaking to the 6th defendant to appoint them as estate management contractor and pay an upfront fee of RM1,996,000 if the sale went through. The whole thing was a conspiracy between the 1st, 2nd and 6th defendants whereby RM1,991,000 is to be paid to the 6th defendant by the 1st defendant and for the 6th defendant to pay part of it to the 2nd defendant; by this method part of the purchase price was diverted. A memo (p. 148 bundle B1) found on the 2nd defendant's table containing the 2nd defendant's handwriting and other documents (pp. 152, 153, 157, 159, 160-163 and 166 bundle B1) shows the diversion of the monies from the 7th defendant to the 6th defendant even before the SPA is executed so that the monies could be taken by all interested parties. The 2nd defendant had conspired with the 1st defendant and 6th defendant in this scheme.

[30] Jagathesan also produced a draft of another letter which was purportedly drafted by the 2nd defendant. That draft was also found on the 2nd defendant's table. The contents of that letter was never discussed at any of the board meetings. He also produced a fax (p. 103 bundle B1) by which the 2nd defendant forwarded the plaintiff's letter dated 8 July 2005 (pp. 104-106 bundle B1) to Ropie who was to forward the same to the 1st defendant. Under a letter dated 19 July 2005, Messrs Bahari & Bahari (M/s B&B) forwarded a draft sale and purchase agreement (pp. 112-129 bundle B1) to the 2nd defendant. The draft sale and purchase agreement was never put up for discussion at any of the board meetings.

[31] At a board of directors' meeting on 3 October 2005, the 2nd defendant's proposal to dispose of the land to meet the immediate financial commitments was not approved by the board; however, the 2nd defendant had secretly entered into a transaction with the 1st defendant to sell the land. The plaintiff company was not in immediate need for funds. Even though the plaintiff was indebted to AmBank and Pengurusan Danaharta Nasional Bhd, there were available funds. This was the 2nd defendant's deliberate act to strip the company's assets acting in concert with the 1st, 6th and 7th defendants. The investigation officer of the Securities Commission in his affidavit (p. 484 bundle B2) mentioned of asset stripping activities of the plaintiff company.

[32] Jagathesan also mentioned about a judgment for RM2,097,315.62 obtained by Mirra Sdn Bhd ('Mirra') against the plaintiff on 30 November 2005. A winding-up petition was filed on 4 January 2006 and served on the plaintiff on 13 January 2006. The 2nd defendant instructed M/s B&B to hold on as he was negotiating with Mirra to resolve the matter. The 2nd defendant also wrote a letter (p. 189 bundle B1) to the plaintiff's solicitors asking them to obtain replacement cheques from the 1st defendant. The two replacement cheques (pp. 107 and 151 bundle B1) were not banked into the plaintiff's account. Jagathesan said that this was because no one else except the 2nd defendant knew that the land was being sold. If it had been banked into the plaintiff's bank account it will show the sums and others will query. The 2nd defendant was putting off revealing the sale to the board and to others. Further, since the 2nd defendant knew that there are suits against the plaintiff company, these

monies may be garnished or seized. On 28 March 2006, the 2nd defendant wrote to the 1st defendant requesting the 1st defendant to again replace the two cheques; this time the replacement cheques were to be made out in favour of M/s B&B. According to Jagathesan, this was because of the winding-up petition which had been filed and served on the plaintiff. Also, the plaintiff's bank account had already been frozen and the proceeds cannot be taken out by the 2nd defendant. The 1st defendant would have known about the winding-up petition against the plaintiff as public announcements have been made (pp. 185, 186, 188 and 196 bundle B1) and an article in the New Straits Times of 14 April 2006 (p. 51 bundle K). The 7th defendant replaced the cheques in favour of M/s B&B (p. 205 bundle B1).

[33] Meanwhile, the previous board directors appointed M/s AHZ to take over from M/s B&B in the sale transaction of the land to the 1st defendant. The sales proceeds were paid by the 7th defendant to M/s AHZ. RM3,626,100 being the first 5% plus the second 25% of the purchase price was paid by the 7th defendant to M/s AHZ on 13 April 2006 (p. 237 bundle B1). The third payment of 30% of the purchase price was remitted by the 7th defendant to M/s AHZ on 16 May 2006 (p. 272 bundle B1). The final 40% of the balance purchase price was remitted by the 7th defendant to M/s AHZ on 11 July 2006 (p. 289 bundle B1).

[34] On 13 April 2006 the plaintiff made an announcement to Bursa Malaysia (p. 234 bundle B1) informing that a winding-up order has been made against the plaintiff company on 13 April 2006 and that the company has filed an appeal against the order. On 14 April 2006, the plaintiff made another announcement to Bursa Malaysia informing that the company has executed the SPA with the 1st defendant for the disposal of the land for RM12,087,000; it also stated that the disposal is conditional on the company obtaining the approval of its shareholders in EGM (p. 244 and p. 246 bundle B1). No EGM was called. No shareholders' approval was obtained for the sale. Bursa Malaysia queried the plaintiff company about its announcements (p. 251A bundle B1; 2nd half of page). The plaintiff replied on 21 April 2006 (p. 250-251 bundle B1). On 4 May 2006, Bursa Malaysia announced that it had commenced de-listing procedures against the plaintiff company (p. 258 bundle B1). On 5 May 2006, Bursa Malaysia announced that it was giving the plaintiff five market

days to make representations as to why its shares should not be de-listed (p. 259 bundle B1). Jagathesan also produced a draft letter (p. 264 bundle B1) addressed to the 7th defendant. He said that it was drafted by the 2nd defendant and passed to M/s AHZ to be sent to the 7th defendant. M/s AHZ sent out the letter after making some corrections (p. 265 bundle B1). According to this letter, M/s AHZ informed the 7th defendant that they have been instructed to asked the 7th defendant to release the 30% of the purchase price amounting to RM3,626,100 to them on their undertaking to hold it as stakeholders in accordance with the SPA. Jagathesan also produced a draft letter (p. 269 bundle B1) which he said was drafted by the 2nd defendant and passed to M/s AHZ who then sent it to the 7th defendant (p. 270 bundle B1); this was a reminder for the release of the 30% payment.

[35] Meanwhile, on 14 June 2006 the plaintiff announced to Bursa Malaysia (p. 280 bundle B1) that the plaintiff's application to set aside the judgment in default had been adjourned to 14 July 2006. Subsequently, on 25 September 2006 (p. 292 bundle B1) the plaintiff announced that the judgment in default had been set aside. On 13 November 2006, the plaintiff announced (p. 296 bundle B1) that an appeal had been filed by Mirra and pending hearing. On 23 November 2006, the plaintiff announced that Bursa Malaysia had rejected the plaintiff's application for extension of time. Mirra's appeal to the Court of Appeal was allowed and the judgment in default against the plaintiff was reinstated and confirmed on 18 September 2007 (pp. 740/1 bundle B3). Subsequently, the winding-up order was also confirmed by the Court of Appeal on 20 September 2007 (pp. 745/6 bundle B3).

[36] An official search from the Insolvency Department dated 9 May 2007 (p. 303 bundle B1) shows that the 2nd defendant was made a bankrupt on 4 March 2002 and at all material times he was a bankrupt. According to the company's statutory records the 2nd defendant only resigned as a director of the plaintiff company on 22 May 2007 (pp. 304/6, pp. 307/311 bundle B1).

[37] Jagathesan also testified that at a board of directors' meeting on 22 May 2007, the 2nd defendant tabled the results of a search conducted at the Insolvency Department on 15 May 2007 which showed that he was not a bankrupt. He was present and saw the search result; the search results were blur and appeared to have

been doctored. According to the minutes of that meeting (p. 313 bundle B1), the 2nd defendant's resignation was accepted. Jagathesan said that the 2nd defendant resigned because the 2nd defendant knew that he was an undischarged bankrupt. Jagathesan also produced another official search from the Insolvency Department dated 11 February 2009 which shows that the 2nd defendant is a bankrupt from 4 March 2002 (p. 870 bundle B3). On 4 October 2011, the Companies Commission of Malaysia placed an advertisement (p. 40 bundle K) in the Utusan Malaysia seeking information on the whereabouts of the 2nd defendant.

[38] Jagathesan also testified that the 6th defendant was paid RM362,610 as commission on 21 April 2006 even though the 6th defendant did not perform any real estate broking services for the plaintiff company. The payment was made by the 2nd defendant and was another means of siphoning out the purchase price.

[39] After the winding-up order was made, the Insolvency Department called for a meeting with the directors in early May 2006. The 3rd, 4th and 5th defendants refused to go for the meeting. The 2nd defendant then produced a Directors' Circular Resolution (p. 82 bundle E1) and asked them to sign it. He told them that if they did not, the board of directors would lose control of the company and the company will have to be surrendered to the Insolvency Department. The 3rd, 4th and 5th defendants then signed the resolution. The 2nd defendant used the same threat to get the 3rd defendant to sign the MOT (p. 1 bundle E2). The 3rd defendant made a report to the Securities Commission, Bursa Malaysia and the Anti Corruption Bureau. The Securities Commission then filed a civil suit against the plaintiff company on 4 September 2007.

[40] The 4th witness Mr. Sukdev Singh a/l Balbir Singh ('Sukdev') is a certified fraud examiner and an executive director in the forensic practice of KPMG. Sukdev was involved in the investigation and preparation of the KPMG Report. The key findings in the KPMG Report are stated in the Executive Summary at pp. 8 to 14 of the report and the detailed findings at pp. 23 to 28.

[41] The account of the plaintiff's 5th and last witness En. Mohd Rizal Bahari ('Rizal') follows. Rizal is a partner of M/s B&B. He acted for the plaintiff company in the SPA. Rizal acted from June 2005 to April 2006. He took instructions from the 2nd defendant. He also dealt with the 2nd defendant's personal assistant one Puan Maznah and one En. Alwi Noorbi bin Haji Mohd Noor ('Noorbi'). Noorbi is a director of the 6th defendant company. Noorbi showed him a letter (p. 100 bundle B1) from the 1st defendant to the 6th defendant; Noorbi told him that the 1st defendant will pay the 6th defendant RM1,991,000 and to Ropie RM142,000 if the sale of the land went through. Noorbi told him that the 6th defendant will be appointed as the estate management contractor of the land. The 6th defendant is to be taken over by the plaintiff company and this payment by the 1st defendant was payment to the right hand to be paid to the left hand; as pre-arranged by the 2nd defendant and the 1st defendant. The payment to Ropie is for the assistance Ropie had given to the 2nd defendant and the plaintiff company (p. 256 bundle B1). Rizal received a copy of the plaintiff's letter dated 8 July 2005 (p. 104 bundle B1) to the 1st defendant. Puan Maznah told him to prepare a draft sale and purchase agreement. Rizal also received a cheque for RM604,350 being 5% of the purchase price drawn in favour of the plaintiff company from the 7th defendant. Rizal prepared a draft sale and purchase agreement and forwarded it to the 2nd defendant. The 2nd defendant sent back the draft with some handwritten amendments. Rizal then sent the draft sale and purchase agreement to the 7th defendant on 21 July 2005 (p. 130 bundle B1). After an exchange of communication between them, Rizal sent the duly engrossed sale and purchase agreement to the 7th defendant for the 1st defendant's execution. On 12 August 2005 the 7th defendant returned the sale and purchase agreement duly executed by the 1st defendant's directors together with a cheque for RM3,021,750 being the second payment of 25% of the purchase price (p. 151 bundle B1). Rizal then forwarded the sale and purchase agreement to the 2nd defendant for execution by the plaintiff company together with the cheques given by the 1st defendant. The 2nd defendant returned the sale and purchase agreement duly executed by the 2nd and 3rd defendants under letter dated August 2005 (p. 156 bundle B1). Subsequently, Rizal received a copy of a letter (p. 159 bundle B1) from the 7th defendant to the 6th

defendant together with the drafts of the undertaking and guarantee (pp. 160/163 bundle B1). Noorbi told him that the money from the 1st defendant to be paid to the plaintiff company and the 2nd defendant is to be paid to the 6th defendant and that this arrangement is advantageous to the 6th defendant. Noorbi also explained that RM142,000 was to be paid to Ropie for helping the 2nd defendant. Rizal also said that the 2nd defendant did not consult him on the preparation of a guarantee given by the 2nd defendant to the 1st defendant for the advance payment of RM1,991,000 by the 1st defendant to the 6th defendant. Noorbie explained to Rizal that the 1st defendant was prepared to pay the advance of RM1,991,000 even before the SPA was signed because the money to be paid by the 1st defendant to the plaintiff for the sale of the land is to be paid to the 6th defendant – the right hand and left hand arrangement of the 1st, 2nd and 6th defendants.

[42] Rizal also wrote a letter (p. 164 bundle B1) to the 2nd defendant where Rizal referred to the 2nd defendant's instructions to withhold the delivery of the SPA to the plaintiff's solicitors. This was because all the guarantees (pp. 160/163 bundle B1) have not been signed by the respective persons and the RM1,991,000 have not yet been paid over to the 6th defendant. Rizal also said that the handwritten amendments to the draft guarantee (p. 166 bundle B1) were made by the 2nd defendant. Rizal also said that when the guarantees both dated 3 October 2005 was signed by Noorbi (p. 167 bundle B1) and the 2nd defendant (p. 168 bundle B1), the SPA had already been executed by the directors of the plaintiff company but not delivered to the 7th defendant. Further, the MOT had not yet been signed by the directors of the plaintiff company. Even though the two guarantees referred to "the Estate Management contract" there is no such contract. Also, the 2nd defendant asked Rizal to keep the guarantee he signed as he did not want too many persons to know about it. The 7th defendant agreed to this arrangement. The 2nd defendant also told Rizal that the 1st defendant was agreeable to the arrangement.

[43] The two cheques for RM3,021,750 and RM604,350 totalling RM3,626,100 was paid into M/s B&B's client account. The 2nd defendant requested Rizal to make payment out to several parties including himself and to do so as and when he wanted Rizal to

do so. To this request, Rizal refused to accede because there was a winding-up petition against the plaintiff company. Rizal then wrote to the plaintiff company (p. 206 bundle B1) informing that he was getting clarification from the relevant authorities regarding the use of the monies. In response the 2nd defendant called him and insisted that he pay out the monies to several parties including himself. Rizal refused to do so. Then the 2nd defendant sent him a letter (p. 208 bundle B1) on 12 April 2006 instructing him to remit the monies to the 7th defendant. Rizal then complied and remitted the monies to the 7th (pp. 203/204 bundle B1). Later, the 2nd defendant appointed M/s AHZ to take over the conduct of the sale transaction of the land.

Evidence Of 1st Defendant's Witnesses

[44] The 1st defendant's witness Mr. Teoh Leong Seng ('Teoh') was instructed to prepare a report and valuation of the land. Teoh produced a valuation report dated 12 October 2011. In his report (pp 8/41 bundle J) he stated that based on the Comparison Method the market value of the land is estimated to be RM59,000,000.

[45] The 1st defendant's second witness Mr. Khoo Cheng Hai @ Ku Cheng Hai ('Khoo') the managing director said that the 1st defendant offered to purchase the land from the plaintiff for RM16,000 per acre on 26 June 2005 (p. 96 bundle B1). Subsequently the 1st defendant increased its offer to purchase to RM17,000 per acre amounting to RM12,087,000 (p. 97 bundle B1). The plaintiff replied to the 1st defendant's letter of offer on 8 July 2005 (pp. 104/106 bundle B1). On 12 July 2005, the 1st defendant agreed and accepted the plaintiff's letter of offer (p. 110 bundle B1). The 1st defendant's solicitors (the 7th defendant) then forwarded a cheque for RM604,350 being 5% of the purchase price to the plaintiff's solicitors M/s B&B (p. 107 bundle B1). After paying the 5% of the purchase price to M/s B&B, the 1st defendant lodged a private caveat against the land on 10 August 2005 (pp. 29 and 203 bundle C).

[46] Khoo also said that after the SPA was finalised, the 1st defendant forwarded a cheque for RM3,021,750 being 25% of the purchase price to the 7th defendant. On 12 August 2005, the 7th defendant then forwarded the said sum to M/s B&B together with

the SPA for execution by the plaintiff company. On 14 October 2005, M/s B&B returned the duly executed SPA to the 7th defendant with instructions to be undated and not to be stamped until further instructions from the plaintiff (pp. 177/8 bundle B1). In the meantime, the two cheques in payment of the initial 5% and 25% of the purchase price was not cleared and had expired. Replacement cheques dated 3 April 2006 were issued to M/s B&B (pp. 190/192, 195, 197/8 bundle B1). After clearance of the replacement cheques, M/s B&B instructed the 7th defendant to date the SPA on 12 April 2006 (p. 202 bundle B1).

[47] On 14 April 2006 the plaintiff made an announcement to Bursa Malaysia pertaining to the sale of the land. It stated, *inter alia*, that the rationale for the disposal of the land is to realise internally generated funds and that it is based on a "willing buyer and willing seller" (pp. 224/246 bundle B1). A subsequent announcement was made on 21 April 2006 replying to Bursa Malaysia's query (pp. 250/251A bundle B1).

[48] M/s AHZ forwarded to the 7th defendant the duly executed MOT in a letter dated 17 April 2006 (p. 249 bundle B1). The 7th defendant forwarded the MOT to the 1st defendant on 17 May 2006 (p. 144 bundle C). The MOT was duly executed and dated by the 1st defendant on 29 May 2006 (pp. 149/152 bundle C). The 1st defendant was not aware of the fact that (i) the 2nd defendant had resigned on 22 May 2007; (ii) the 2nd defendant was an undischarged bankrupt at the time the MOT was executed; or (iii) the 3rd, 4th and 5th defendants were removed at the EGM held on 7 September 2007.

[49] The 1st defendant was aware of the winding-up order made on 13 April 2006 against the plaintiff company. The 7th defendant asked M/s AHZ whether they have obtained the sanction from the Official Receiver (p. 252 bundle B1). The OR replied to M/s AHZ on 28 April 2006 stating that they had no objections to the sale of the land (p. 255 bundle B1). In the meantime, the 7th defendant conducted official searches which showed that there was no winding-order against the plaintiff company (pp. 100 and 103 bundle C). On 15 May 2006, M/s AHZ delivered the relevant documents to the seven defendant (p. 266 bundle B1). The arrears of the quit rent was to be paid by utilising part of third payment of 30% of the purchase price (p. 270 bundle B1). On

16 May 2006, the third payment of RM3,625,590 was made to M/s AHZ's client account (pp. 272/3 bundle B1). In the meantime, the 1st defendant settled the quit rent arrears of RM57,024 on 18 May 2006 (pp. 275/6 bundle B1).

[50] After receiving all the relevant documents for registration, the 7th defendant presented the MOT for registration of the transfer in the 1st defendant's favour (p. 191 bundle C). Thereafter, the land was duly registered under the 1st defendant's name on 27 June 2006. The 7th defendant released the final payment of 40% of the purchase price to M/s AHZ after receipt of the plaintiff's letter of undertaking that no shareholders' approval is necessary and to refund the purchase price in the event that the transfer cannot be registered (pp. 286/290 bundle B1).

[51] The plaintiff obtained the approval from the Johore Estate Land Board on 25 May 2006 (p. 155 bundle C). The stamp duty on the transfer amounting to RM356,610 based on the government valuation of RM12,087,000 was paid on 19 June 2006 (p. 153 bundle C).

Evidence Of 4th & 5th Defendants

[52] Both the 4th defendant Mr. Keow Hock Sneah ('Keow') and the 5th defendant Low Kok Hwa @ Low Koh Hwa ('Low') testified that at all material times they were independent non-executive directors of the plaintiff company. They did not have access to the day to day operations of the plaintiff unless the same are brought up in the board of directors' meeting of the plaintiff. At all material times, the 2nd and the 3rd defendants were in charge of the day to day operations and businesses of the plaintiff company. Prior to 10 April 2006, they had no knowledge of the disposal of the land to the 1st defendant. They signed the Directors' Circular Resolution pertaining to the proposed sale of the land to the 1st defendant in good faith. However, before signing the same, the 2nd defendant had explained to them that the sale of the land was an arms' length transaction and the plaintiff required urgent funds to pay its liabilities and for working capital. They did not have any personal knowledge of what transpired after 10 April 2006.

Evidence Of 7th Defendant

[53] The 7th defendant's witness Mr. Lee Fook Leong ('Lee') testified that 1st defendant retained his firm to act for them in the SPA. On 13 July 2005, he returned the plaintiff's letter of offer dated 8 July 2005 together with a cheque for RM604,350 being 5% of the purchase price to M/s B&B. Subsequently, he received a draft sale and purchase agreement from M/s B&B. On 5 August 2005, after the 1st defendant finally agreed to the sale and purchase agreement, Lee asked M/s B&B to forward the fair copies of the SPA together with copies of the plaintiff's M&A, Forms 24 and 49 and resolution ('the corporate documents'). On 8 August 2005, Lee received the fair copies of the SPA. On 9 August 2005, Lee forwarded the copies of the sale and purchase agreement to the 1st defendant for execution; he also wrote to M/s B&B asking for the corporate documents. The 1st defendant returned the duly executed SPA together with a cheque for RM3,021,750 being 25% of the purchase price to Lee on 12 August 2005. On 13 August 2005, Lee forwarded the same to M/s B&B. On 13 October 2005, Lee wrote to M/s B&B asking for the return of the duly executed SPA. Lee received the same on 14 October 2005 with instructions not to date and stamp the same prior to the instructions of the plaintiff. On 21 March 2006, Lee received a letter from M/s B&B returning the two cheques for RM604,350 and RM3,021,750 and asking for replacement cheques to be issued. Lee forwarded the replacement cheques on 22 March 2006. On 3 April 2006, the two replacement cheques were returned with a request to replace them with fresh cheques payable to M/s B&B's client account. Later that day Lee forwarded the fresh cheques to M/s B&B. On 12 April 2006, Lee received a letter from the plaintiff informing that M/s AHZ had been appointed to take over from M/s B&B; Lee was asked to remit the 30% payment of the purchase price amounting to RM3,621,100 to M/s AHZ. Lee was also extended a copy of the plaintiff's letter to M/s B&B. On 13 April 2006, M/s AHZ wrote to Lee asking for the 30% payment to be paid into their client account. Lee replied informing that the remittance would be made subject to certain conditions. On 14 April 2006, Lee remitted the 30% payment to M/s AHZ. On 17 April 2006, M/s AHZ sent the duly executed MOT to Lee and asked for payment of a further 30% of the purchase price.

[54] However, Lee was informed that the plaintiff company had been wound-up and the Official Receiver appointed. On 21 April 2006, Lee wrote to M/s AHZ asking for confirmation on whether they were authorised by the Official Receiver to continue to act in the SPA. Meanwhile, two official searches conducted at the Insolvency Department Malaysia on 24 April 2006 and 27 April 2006 revealed that there was no winding-up order made against the plaintiff. Meanwhile, Lee received a copy of letter dated 25 April 2006 from M/s AHZ to the Director Insolvency Department Malaysia asking for the consent and approval to proceed with the SPA. On 27 April 2006, Lee forwarded a stamped copy of the SPA to M/s AHZ.

[55] On 8 May 2006, Lee received a letter from M/s AHZ enclosing a copy of the consent letter dated 28 April 2006 from the Insolvency Department Malaysia. In reply, Lee asked M/s AHZ for confirmation that M/s AHZ would retain the payment as stakeholders and for an indemnity. M/s AHZ replied the following day on 9 May 2006 with their undertaking and indemnity. Lee then wrote to M/s AHZ asking for confirmation that the title deed to land and other relevant documents have been deposited with them. On 10 May 2006, M/s AHZ gave their confirmation. On 15 May 2006, Lee wrote to M/s AHZ asking for their undertaking to utilise part of the 30% payment to settle the outstanding quit rent arrears of RM57,024. On 15 May 2006, M/s AHZ gave their undertaking to Lee. On 16 May 2006, Lee remitted the 30% payment of the purchase price of RM3,625,590 to M/s AHZ's client account. On 19 May 2006, Lee wrote to M/s AHZ asking for the title deed, the relevant documents including the shareholders' resolution. Meanwhile, the 1st defendant had paid quit rent arrears. On 26 May 2006, M/s AHZ forwarded the title deed to the land; they also requested that RM57,024 be deducted from balance 40% of the purchase price. On 31 May 2006, Lee gave an undertaking to release the balance 40% payment within one week from the date of registration of the transfer in favour of the 1st defendant. The MOT was presented at the Segamat Land Office on 24 June 2006 and the transfer was registered on 27 June 2006.

[56] On 11 July 2006, Lee received a letter dated 10 July 2006 from M/s AHZ enclosing the plaintiff's letter of confirmation and undertaking that no shareholders' resolution is necessary for the sale of the land. On 11 July 2006, Lee then remitted the balance 40% of the purchase price amounting to RM4,776,756 to the client account of M/s AHZ.

Chronology Of Events

[57] For ease of reference and to better appreciate the sequence of events, a chronology of the salient facts are set out below.

Dates	Events
5 May 2005	6th defendant's letter to plaintiff offering to be sales agent for sale of the land.
27 May 2005	Plaintiff appoints the 6th defendant as the sales agent for the land.
30 May 2005	Market value of the land valued at RM19,435 per acre by JAZ International Malaysia Sdn Bhd.
26 June 2005	1st defendant's letter to plaintiff expressing interest to purchase the land at RM16,000 per acre.
29 June 2005	1st defendant's letter to plaintiff increasing the offer to RM17,000 per acre.
30 June 2005	1st defendant's letter to the 6th defendant informing of its intention to purchase the land. 1st defendant undertakes to appoint 6th defendant as the estate management contractor in the event sale and purchase of the land is successful.
8 July 2005	Plaintiff's letter of offer to 1st defendant offering to sell the land at RM17,000 per acre. Total purchase price for the land is RM12,087,000.

12 July 2005	1st defendant accepts plaintiff's offer.
13 July 2005	7th defendant forwards cheque ('the 1st cheque') for RM604,350 being payment of 5% of purchase price to M/s B&B.
19 July 2005	M/s B&B submits draft SPA to the 2nd defendant for approval.
21 July 2005	M/s B&B submits draft SPA to 7th defendant for approval.
5 August 2005	7th defendant informs M/s B&B that draft SPA approved.
8 August 2005	M/s B&B sends engrossed SPA to 7th defendant for execution by 1st defendant.
9 August 2005	7th defendant sends engrossed SPA to 1st defendant for execution.
10 August 2005	1st defendant lodges private caveat against the land.
12 August 2005	1st defendant returns duly executed SPA together with a cheque ('the 2nd cheque') for RM3,021,750 being balance 25% of purchase price.
	7th defendant forwards same to M/s B&B.
16 August 2005	7th defendant conducts official land search on the land.
18 August 2005	2nd defendant returns SPA duly executed by 2nd and 3rd defendants to M/s B&B.
16 September 2005	7th defendant's letter to 6th defendant confirming that 1st defendant is agreeable to early payment of the contract fees. Encloses drafts of guarantee and undertaking.

17 September 2005	M/s B&B writes to plaintiff confirming plaintiff's instructions to withhold delivery of the SPA to 7th defendant.
3 October 2005	Guarantees in favour of 1st defendant signed by Noorbi, 2nd defendant and 6th defendant. Undertaking letter signed by M/s B&B.
	BOD meeting of plaintiff company. Meeting discussed about plaintiff's ability to meet its financial obligations. 2nd defendant proposes the disposal of land to get immediate funds. No decision made on disposal of land.
13 October 2005	7th defendant writes to M/s B&B for duly executed SPA.
14 October 2005	M/s B&B returns SPA duly executed by plaintiff upon 7th defendant's undertaking not to date and stamp the SPA until further instructions from the plaintiff.
2 November 2005	1st defendant's letter asking plaintiff for the land to be handed over for purposes of harvesting and estate management to prevent further damage to the land.
10 November 2005	Plaintiff agrees to 1st defendant's request to take immediate possession of the land.
4 January 2006	Winding-up petition presented against plaintiff company.
16 January 2006	Plaintiff's announcement to Bursa Malaysia informing that plaintiff has been served with a winding-up petition taken by Mirra.

17 January 2006	Plaintiff's announcement in reply to Bursa Malaysia's query furnishing particulars of the petition.
18 January 2006	Bursa Malaysia makes an Investor Alert Announcement about the plaintiff's announcement on 16 January 2006 and 17 January 2006.
20 March 2006	Plaintiff writes to M/s B&B enclosing 1st and 2nd cheques to be delivered to the 7th defendant in return for replacement cheques.
21 March 2006	M/s B&B returns the 1st and 2nd cheques to the 7th defendant and asks for replacement cheques.
22 March 2006	The 7th defendant sends two replacement cheques ('the 3rd and 4th cheques') to M/s B&B.
24 March 2006	Maybank's letter to plaintiff informing that plaintiff's account has been frozen due to winding-up proceedings.
28 March 2006	Plaintiff's letter to 1st defendant asking for the 3rd and 4th cheques to be replaced with new cheques made payable to M/s B&B.
30 March 2006	Plaintiff's announcement to Bursa Malaysia informing that hearing of winding-up petition adjourned to 13 April 2006.
3 April 2006	M/s B&B returns the 3rd and 4th cheques to the 7th defendant. Asks for replacement cheques to be made to their client account. Instructs that SPA to be dated one day after replacement cheques duly credited into their client account.

	The 7th defendant sends two replacement cheques ('the 5th and 6th cheques') to M/s B&B.
10 April 2006	Directors' Circular Resolution passed to sell the land to the 1st defendant for RM12,087,000. M/s B&B informs the 7th defendant to date the SPA on 12 April 2006.
12 April 2006	SPA dated by 7th defendant.
	M/s B&B writes to plaintiff informing that pending the winding-up proceedings and the hearing of the plaintiff's application to set aside the judgment in default, they are getting clarification from the relevant authority on the use of the purchase price held by them.
	Plaintiff writes to M/s B&B instructing them to remit the monies by telegraphic transfer to the 7th defendant.
	M/s B&B remits RM3,626,100 to 7th defendant.
	Plaintiff writes to 7th defendant informing that date of SPA to remain as 12 April 2006. Instructs 7th defendant to remit RM3,626,100 to plaintiff's new solicitors M/s AHZ.
13 April 2006	Winding-up order made.
	Plaintiff's announcement to Bursa Malaysia informing of the winding-up order.

	Plaintiff's letter to 1st defendant informing that M/s AHZ has been appointed to act as plaintiff's solicitors in place of M/s B&B.
	M/s AHZ write to 7th defendant asking for 30% payment of RM3.6million to be paid into their client account by 14 June 2006.
14 April 2006	Plaintiff's announcement to Bursa Malaysia informing that SPA executed on 12 April 2006.
	Bursa Malaysia's Listing Circular informing that trading of plaintiff's shares has been suspended until further notice.
	7th defendant remits RM3,626,000 to M/s AHZ.
17 April 2006	M/s AHZ delivers MOT to 7th defendant and asks for stamped sale and purchase agreement and payment of further 30% of purchase price.
	Bursa Malaysia's Investor Alert Announcement on the plaintiff's announcement relating to the winding-up order.
21 April 2006	Plaintiff's general announcement of its reply to Bursa Malaysia's query on the proposed disposal of the land to the 1st defendant.
	7th defendant's letter to M/s AHZ asking whether they have been authorised by Insolvency Department to act for the plaintiff.

25 April 2006	7th defendant receives copy of letter dated 25 April 2006 from M/s AHZ to Director Insolvency Department Malaysia asking for its consent to proceed with the SPA.
27 April 2006	7th defendant forwards stamped SPA to M/s AHZ.
4 May 2006	Bursa Malaysia's announcement that it has served a notice to show cause as to why its securities should not be de-listed.
5 May 2006	Plaintiff's general announcement pertaining to Bursa Malaysia's notice to show cause.
8 May 2006	M/s AHZ forwards to 7th defendant letter of consent/approval from Insolvency Department Malaysia dated 27 April 2006.
9 May 2006	7th defendant asks M/s AHZ for confirmation that payment will be made to them as stakeholders and for an indemnity.
	M/s AHZ confirms and provides indemnity.
	7th defendant asks M/s AHZ to confirm that they have the title deed and other relevant documents.
10 May 2006	M/s AHZ confirms custody of title deed and sends board resolution dated 10 April 2006 and other documents to 7th defendant.
15 May 2006	7th defendant asks M/s AHZ for undertaking to utilise part of 30% payment to settle outstanding quit rent arrears.
	M/s AHZ gives undertaking.

16 May 2006	7th defendant remits further 30% of purchase price amounting to RM3,625,590 to M/s AHZ's client account.
17 May 2006	Winding-up order stayed pending appeal to Court of Appeal.
	Plaintiff's announcement about the stay order.
19 May 2006	7th defendant's letter to M/s AHZ asking for the title deed, the relevant documents including the shareholders' resolution. Gives undertaking to pay balance 40% purchase price within one week after transfer registered in 1st defendant's name.
25 May 2006	Johor Estate Land Board grants approval for transfer of land to 1st defendant.
26 May 2006	M/s AHZ forwards title deed to 7th defendant. Asks for quit rent arrears to be deducted from balance 40% of purchase price.
29 May 2006	MOT executed by plaintiff.
31 May 2006	7th defendant gives undertaking to M/s AHZ to release balance 40% of purchase price within one week from date of registration of transfer in favour of 1st defendant.
5 June 2006	Director of Land and Mines Johor writes to plaintiff enclosing Johor Land Board's approval.
24 June 2006	MOT presented at Segamat Land Office.

27 June 2006	Transfer registered in favour of 1st defendant. Land charged to OCBC to secure a loan to finance the purchase of the land.
10 July 2006	M/s AHZ delivers plaintiff's letter dated 10 July 2006 to 7th defendant under which plaintiff confirms and undertakes to 1st defendant that no shareholders' resolution is necessary.
11 July 2006	7th defendant remits the final 40% of purchase price of RM4,777,266 (RM4,834,800 less deductions of quit rent of RM57,024 and bank charges) to client account of M/s AHZ.
9 May 2007	Official search from Jabatan Insolvensi Malaysia showing that the 2nd defendant was made a bankrupt on 4 March 2002.
22 May 2007	Plaintiff's board of directors' meeting. 2nd defendant tabled results of a search dated 15 May 2007 confirming that he is not a bankrupt. 2nd defendant's resignation as managing director of plaintiff company accepted.
	Form 49 showing that 2nd defendant resigned as company director on 22 May 2007.
23 May 2007	Plaintiff's announcement to Bursa Malaysia on the 2nd defendant's resignation and appointment of new directors.
20 September 2007	Plaintiff's appeal to Court of Appeal dismissed. Winding-up order affirmed; stay order set aside.

8 August 2008	Permanent stay order granted on the winding-up order.
11 February 2009	Official search from Jabatan Insolvensi Malaysia showing that the 2nd defendant was made a bankrupt on 4 March 2002.
4 October 2010	Notice in Utusan Malaysia placed by SSM seeking information on whereabouts of 2nd defendant.

Findings Of The Court

[58] In this case the principal issues for determination relates to (1) whether the sale of the land to the 1st defendant was effected by the fraud, dishonesty and conspiracy of the 1st to 7th defendants; and (2) whether the sale and transfer of the land to the 1st defendant is valid and effective as it was effected during the period after the presentation of a winding-up petition and after a winding-up order had been made. The first issue is a question of fact. The second issue is essentially a question of law.

Whether The Sale Of The Land To The 1st Defendant Was Effected By The Fraud, Dishonesty And Conspiracy Of The 1st To 7th Defendants?

Fraud And Indefeasibility Of Title Under s. 340 National Land Code

[59] The 1st defendant is presently the registered proprietor of the land. According to s. 340(1) NLC, a title which is registered is indefeasible in that it is free of all adverse claims or encumbrances not noted on the register. The indefeasibility of title is, however, not absolute. It may be set aside under the following circumstances prescribed under s. 340(2) NLC.

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[60] The plaintiffs' case is that the sale and transfer of the land to the 1st defendant was carried out by the fraud, dishonesty and conspiracy of the 1st to 7th defendants. For the purposes of vitiating title to land under s. 340 NLC the fraud must be actual fraud. What is fraud? It is impossible to lay down a complete and comprehensive definition of fraud. The range of fraud is infinite. Examples of actual fraud may be found in decided cases. Actual fraud is where one person causes pecuniary injury to another by intentionally misrepresenting or concealing a material fact which from their mutual position he was bound to explain or disclose. If a person by intentional misrepresentation or concealment of a material fact peculiarly within his knowledge induces another person to enter into a contract, conveyance or similar transaction with him, which he would not have entered into had he known the truth, the contract or other transaction is fraudulent (*Jowitt's Dictionary of English Law,* 2nd edn.). In order to render an indefeasible title defeasible it is necessary to prove actual fraud (see *Perwira Habib Bank (M) Bhd v. Bank Bumiputra (M) Bhd.* [1987] 1 LNS 75; [1988] 3 MLJ 54). In this context actual fraud means dishonesty of some sort where the designed object of a transfer is to cheat a person of an existing right or whether by a deliberate and dishonest act a person is deprived of his existing right (see *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] 1 LNS 21; [1983] 2 MLJ 196, *Loke Yew v. Port Swettenham Rubber Co Ltd* [1913] AC 491 and *Robertson v. Keith* [1870] 1 VR (E) 11). The fraud must be that of the registered proprietor or his privy. The fraud of an agent will affect the principal who is the registered proprietor unless the agent acted outside his authority (*Schultz v. Corwill Properties Pty Ltd* [1969] 2 NSWR 576; *Ratcliffe v. Watters* [1969] 2 NSWR 146).

Burden Of Proof In Civil Proceedings

[61] In law, the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s. 101(1) Evidence Act 1950). The burden of proof is on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged

its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is the plaintiff who must establish its case. If the plaintiff fails to do so, it will not do for the plaintiff to say that the defendant has not established its defence (*Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 CA; s. 102 Evidence Act 1950). It should also be noted that there must be some preponderance in the plaintiff's favour at the conclusion of the whole case. Even if the plaintiff established a *prima facie* case, but at the conclusion of the trial the court found that the position was exactly even, then any preponderance in favour of the plaintiffs had ceased to exist. If that happens, then the plaintiff has failed to discharge the burden of proof which is upon it, and the plaintiff must necessarily fail (*Abrath v. North Eastern Railway Co* [1883] 11 QBD 440, 452 (CA)). In this case, however, the plaintiff's case is predicated on the fraud, dishonesty and conspiracy of the 1st to 7th defendants. What is the standard of proof required where there is an allegation of fraud in civil proceedings?

Standard Of Proof Of Fraud In Civil Proceedings

[62] As a general rule, proof in civil proceedings of facts amounting to the commission of a criminal act (such as forgery and fraud) need only be on a balance of probabilities. Nevertheless, there is, a clear distinction between forgery and fraud. The common law of Malaysia has developed an exception to this general rule in relation to fraud. Where the allegation relates to the forgery of documents or handwriting, the standard of proof is on a balance of probabilities (*Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229 (FC)). However, where as in this case fraud is alleged the onus of proof lies on the plaintiff to prove the fraud beyond reasonable doubt. In *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1; [2007] 2 MLJ 301 (FC), Nik Hashim FCJ delivering the unanimous judgment of the Federal Court said at p. 19:

> It is now settled law that the standard of proof required where there is an allegation of fraud in civil proceedings must be one of beyond reasonable doubt and not on a balance of probabilities (see *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229 (FC)). Thus, it is rather perplexed on the part of the Court of Appeal

> to come to a finding that the available circumstantial evidence satisfies both the standards like balance of probabilities and beyond reasonable doubt. Indeed, the stance taken by the Court of Appeal is surprising, not only reflects a departure from the Federal Court's latest binding precedent but perhaps also a lack of appreciation as to the required standard of proof in a civil proceedings focusing on criminal conduct.

[63] In *Chu Choon Moi v. Ngan Sew Tin* [1985] 1 LNS 134; [1986] 1 MLJ 34 Syed Agil Barakbah SCJ, in delivering the judgment of the former Supreme Court said at p. 38:

> We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture *(Narayan v. Official Assignee, Rangoon; Saminathan v. Pappa)*.

[64] In *Goh Hooi Yin v. Lim Teong Ghee & Ors* [1990] 2 CLJ 203; [1990] 2 CLJ (Rep) 48; [1990] 3 MLJ 23, the plaintiff was seeking specific performance against the 4th defendant who sold the property to the 5th defendant. The plaintiff alleged that the sale was a fraudulent device to deprive him of the benefit of his action for specific performance. Edgar Joseph Jr. J (later SCJ) in ruling against the plaintiff held at p. 66 (CLJ); p. 34 (MLJ):

> There must be evidence from which a court can properly infer such an intent and the Privy Council has held that the onus of proof of fraud even in a civil case in Malaysia is proof beyond reasonable doubt (*Saminathan v. Pappa* per Lord Diplock at p. 126). It is not enough to show that the transfer had the effect of depriving the plaintiff of a known existing right. It must be demonstrated that the transfer was executed with the intention of cheating the plaintiff of such right. Furthermore, it is immaterial to decide whether there were other intentions and equally immaterial to decide which the dominant intention. The intention to cheat must be one which has a substantial influence on the decision to make the transfer.
>
> In all the circumstances, I find that the charge of fraud against the fourth and the fifth defendants, whether separately or jointly, has not been made out, with the result that the suit against them is dismissed with costs.

[65] In the particular context of this case, it is pertinent to emphasize that the principles of law on fraud are well settled by leading authorities. It is that fraud under the Torrens system like our National Land Code must be actual fraud, and not

constructive or equitable fraud. The Privy Council applied these well-settled principles in *Assets Co Ltd v. Mere Roihi* [1905] AC 176. In *Ong Ban Chai v. Seah Siang Mong* [1998] 3 CLJ 637; [1998] 3 MLJ 346 (CA), Mokthar Sidin JCA in referring to the leading authorities when delivering the unanimous judgment of the Court of Appeal said at pp. 666 (CLJ); pp. 366-367 (MLJ):

> The Privy Council in *Assets Co Ltd v. Mere Roihi & Ors* [1905] AC 176 held that "fraud" in the Torrens system means 'actual fraud'. It was later held by the Privy Council in the leading and frequently cited case of *Waimiha Sawmilling Co Ltd (In Liquidation) v. Waione Timber Co Ltd* [1926] AC 101 that knowledge of pending litigation and adverse claim did not amount to fraud. These two cases were applied by the Federal Court in *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] 2 MLJ 196 where Lee Hun Hoe CJ (Borneo) said at p. 200:
>
> > ... However, the Privy Council has made clear in *Assets Co Ltd v. Mere Roihi & Ors* that "fraud" in the Torrens system means 'actual fraud' and not 'constructive or equitable fraud.
>
> At p. 201, his Lordship said:
>
> > ... In a subsequent case of *Waimiha Sawmilling Co Ltd (In Liquidation) v. Waione Timber Co Ltd*, the Privy Council held that a registered proprietor who took a transfer with actual knowledge of an existing adverse claim against his transferor, acquired an indefeasible title as his more knowledge of the existence of the adverse claim did not amount to fraud.

In *Tai Lee Finance Co Sdn Bhd v. The Official Assignee Of The Property Of Ngan Kim Yong & Ors* [1983] 1 CLJ 183; [1983] (Rep) 387; [1983] 1 MLJ 81, Abdul Hamid FJ (as he then was) held that fraud must be actual, not constructive or equitable. At p. 393 (CLJ); p. 85 (MLJ) he said:

> As we stated earlier, the essential question that must be determined is whether the appellant was a party or privy to any fraud the chargor was guilty of. And the question is one of fact. The law is clear that the onus is upon the respondents to prove beyond any reasonable doubt that there was fraud, not constructive or equitable fraud but actual fraud. The appellant must be shown to be guilty of an act involving 'dishonesty – a

wilful and conscious disregard and violation of the right of other persons'. *(Waimiha Sawmilling Co Ltd (In Liquidation) v. Waione Timber Co Ltd)*.

[66] The plaintiff's case is predicated upon the following facts. Firstly, the 2nd defendant agreed to appoint the 6th defendant as the sale agent for the land with a commission at 3% of the purchase price. However, Ropie and not the 6th defendant introduced the land to the 1st defendant. Yet, the 6th defendant was paid RM326,610 by the plaintiff. The two letters from the 1st defendant dated 26 June 2005 and 29 June 2005 were signed by Khoo as director even though he was not a director at the material times. A draft of a letter dated 30 June 2005 from the 1st defendant to the plaintiff was initially prepared by the 2nd defendant. The draft letter was found in the 2nd defendant's desk by the current board. There was no reason for the 2nd defendant to fax a copy of the plaintiff's letter of offer dated 8 July 2005 to Ropie if the 6th defendant was the sale agent. A memo from the 2nd defendant's desk stating the 1st defendant's name and the sums RM2,133,000, RM1,991,000 and RM142,000. Learned counsel submitted that it can be inferred that from the total of RM2,133,000, RM1,991,000 is to be paid to the 6th defendant and RM142,000 to Ropie. On 19 August 2005, the 7th defendant informs 6th defendant that a cheque for RM2,133,000 has been deposited with them by the 1st defendant; with instructions to pay the 6th defendant RM1,991,000 and Ropie RM142,000. On 29 August 2005, the 7th defendant sends to the 6th defendant a photocopy of a cheque for RM1,991,000 in favour of the 6th defendant with an undertaking to pay the said sum upon completion of the SPA. On 16 September 2005, the 7th defendant informs the 6th defendant that the 1st defendant is agreeable to early payment of the contract fees subject to receipt of the 6th defendant's undertaking to refund the said sum, a joint and several guarantee by all the 6th defendant's directors to immediately refund the said sum in the said event, and a guarantee by the 2nd defendant to refund the said sum in the event the SPA is terminated. The 6th defendant's undertaking and the guarantees were executed. Noorbi and Khoo met twice. Rizal said that he and the 2nd defendant were also present at one of the meetings.

[67] Learned counsel for the plaintiff submitted that the aforesaid events shows a clear link between the 1st defendant (through Khoo), the 2nd defendant, the 6th defendant (through Noorbi) and the 7th defendant. This peculiar arrangement to pay to the 6th defendant RM1,991,000 and to Ropie RM142,000 was hatched and arranged by Khoo, the 2nd defendant and Noorbi. It was facilitated by the 7th defendant. There was no estate management contract. Rizal stated that the RM1.9 million and RM142,000 was directed out from the sale proceeds of the land even before the SPA was dated and stamped.

[68] Secondly, by agreeing to deliver possession of the land to the 1st defendant even though the SPA has not yet been signed, the full purchase price not paid and without any resolution is further evidence of fraud perpetrated by the 1st defendant and the 2nd defendant.

[69] Thirdly, the instances relating to the replacement cheques had put the 7th defendant on inquiry. The 2nd defendant wrote to M/s B&B on 20 March 2006 asking for the 1st and 2nd cheques (which had since expired) to be replaced. M/s B&B followed up on 21 March 2006. On 22 March 2006, the 7th defendant sends the replacement cheques (the 3rd and 4th cheques) even though they knew or ought to have known that winding-up proceedings had been commenced against the plaintiff. The 7th defendant was put on inquiry as to why the plaintiff had not cleared the 1st and 2nd cheques. The 3rd and 4th cheques were also not cleared by the plaintiff. Instead, the 2nd defendant writes directly to the 1st defendant asking for these cheques to be replaced with cheques in favour of M/s B&B. The 3rd and 4th cheques were returned by M/s B&B to the 7th defendant. On 3 April 2006, the 7th defendant sends the 5th and 6th cheques for RM3,626,100 to M/s B&B. However, on 12 April 2006 (i) M/s B&B remits RM3,626,100 back to the 7th defendant, and (ii) plaintiff writes to 7th defendant asking that said sum be paid to M/s AHZ.

[70] Learned counsel for the plaintiff submitted that in the aforesaid circumstances this is fraud on the part of the 1st and 7th defendants. The 7th defendant had been put on inquiry as to the irregularities. Yet the 7th defendant did the bidding of the 2nd defendant without questioning the 2nd defendant.

[71] Fourthly, in furtherance of the fraud of the 1st, 2nd and 6th defendants, the 7th defendant accepted the forged letter dated 27 April 2006 from the Insolvency Department Malaysia purportedly and in disregard of established laws and advised the 1st defendant to proceed with the SPA.

Decision

[72] In order for the allegation of conspiracy to commit fraud against all the seven defendants to be proven, there must be evidence upon which the court can infer such an intent. It must be shown that the sale and transfer of the land was executed with the intention of cheating the plaintiff of such right. In this instance, it must be emphasized that the fraud to be proved is actual fraud and not merely constructive or equitable fraud.

Tort Of Conspiracy

[73] The essence of conspiracy is that there should be an agreement between persons to do the illegal acts. This agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties. The evidentiary value of such acts is limited by two circumstances. The acts shall be (i) in reference to their common intention, and (ii) in respect of a period after such intention was entertained by any one of them. In law the tort of conspiracy may take two forms: (1) conspiracy by unlawful means; and (2) conspiracy by lawful means. In *Quah Kay Tee v. Ong and Co Pte Ltd* [1996] 3 SLR(R) 637 the Singapore Court of Appeal elucidated at p. 653 that:

> The tort of conspiracy comprises two types: conspiracy by unlawful means and conspiracy by lawful means. A conspiracy by unlawful means is constituted when two or more persons combine to commit an unlawful act with the intention of injuring or damaging the plaintiff, and the act is carried out and the intention achieved. In a conspiracy by lawful means, there need not be an unlawful act committed by the conspirators. But there is an additional requirement of proving a "predominant purpose" by all the conspirators to cause injury or damage to the plaintiff, and the act is carried out and the purpose achieved.

[74] In short, the key ingredients of the tort of conspiracy are:

(i) an agreement between two or more persons;

(ii) to commit an act with the intention to injure or cause damage to the plaintiff;

A (iii) the act is executed and the plaintiff is injured or suffered damage; and

(iv) if the act executed is not an unlawful act, then it must also be shown that the intention to cause injury or damage to the
B plaintiff was the predominant or main purpose.

[75] The 4th and 5th defendants were at all material times the independent non-executive directors of the plaintiff company. They were not involved in the day to day running of the plaintiff company. They were only kept informed of matters which came
C out at board meetings. They signed the Directors' Circular Resolution approving the sale of the land to the 1st defendant in good faith. At the material time the plaintiff company was undergoing a difficult financial period. It was in need of cash or financial injection to tie over the debts and working capital. The
D 4th defendant is a retiree and a gentleman of 69 years of age. The 5th defendant is an architect and of 67 years of age. Both the 4th and 5th defendants were candid, credible and consistent in their testimonies.

E **[76]** It is not disputed that up until his resignation on 22 May 2007, the 2nd defendant was acting as the managing director of the plaintiff company. The 3rd defendant was also a director until his removal on 7 September 2007 at an EGM of the shareholders of the plaintiff company. In all the circumstances described by the
F plaintiff above, the court finds that there is in fact no evidence of actual fraud. Firstly, the price for the land was agreed upon between the plaintiff and the 1st defendant. This is consistent with cl. 3(36) of the plaintiff's M&A where it provides that the plaintiff can sell or dispose of its assets for such consideration as the
G company may think fit *(The Law of Contract in Malaysia And Singapore* (Oxford University Press) Prof Visu Sinnadurai at p. 81; *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths Asia 1998) at pp. 165 and 166; *Tan Chiw Thoo v. Tee Kim Kuay* [1997] 1 CLJ 541; [1997] 2 MLJ 221 (FC)). Teoh (DW3) a
H registered valuer testified that the assessment of the government valuation of RM12,087,000 is a reasonable assessment of the current market value at that time. Teoh also stated that the valuation department has all the data in its databank, the transactions shown and are in the best position to make accurate
I valuations. In all the circumstances, the court is not satisfied that the sale price of the land to the 1st defendant was undervalued.

[77] What about the evidence on the appointment of the 6th defendant, the early payment of the estate management fees, and payment to Ropie? The early payment of the estate management fees by the 1st defendant to the 6th defendant did not involve the purchase price for the land. The payment to Ropie was a commission for his services. The plaintiff company did not suffer any loss; nor was any monies belonging to the plaintiff wrongly diverted. What transpired between the parties did not appear to have been entirely straight forward. The KPMG Report lacks probative value as Sukdev (PW4) agreed under cross-examination that his KPMG Report is subject to the limitations stated therein - in particular, the fact that he did not interview the 1st, 2nd and 3rd defendants. Sukdev also agreed that there was no undervaluation. Therefore, what transpired between the 1st and 6th defendants did not play any part in the fraud alleged. Accordingly, it follows that the intention of the parties relating to the estate management contract is inconsequential to the question of intention to defraud the plaintiff company.

[78] The SPA was duly executed by the 2nd and 3rd defendants as officers of the plaintiff company. The SPA was ratified by the plaintiff company when the board resolution was duly passed by all the four directors on 10 April 2006. The plaintiff company also made the necessary announcement of the SPA to Bursa Malaysia on 14 April 2006. The evidence relating to the replacement of the cheques is on the face of it unusual. However, it does not detract from the fact that the full purchase price has been paid by the 1st defendant to the plaintiff. This fact is confirmed by the documentary evidence and by the plaintiff's own witnesses – in particular Jasmi and Jagathesan.

[79] What about the fact that there was no shareholders' approval for the sale of the land to the 1st defendant? Learned counsel for the 1st defendant submitted that the plaintiff had already confirmed that no shareholders' resolution was necessary for the sale of the land. The 1st defendant did not and would not be in a position to know what proportion of the land would form in relation to the total assets of the plaintiff. At all material times, the 1st defendant had been dealing in good faith for valuable

consideration. The fact that the SPA and the transfer of the land to the 1st defendant was transacted without the plaintiff's shareholders' approval in general meeting cannot be sustained (*Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd; Soo Yuh Mian (Intervener)* [2011] 3 CLJ 16; [2011] 4 MLJ 173 (CA); *Chan Thiam Teng v. Ban Swee Heng Sdn Bhd* [1992] 1 LNS 37; [1992] 2 MLJ 583).

[80] In *Ezzen Heights, supra* Low Hop Bing JCA in delivering the judgment of the Court of Appeal said at p. 25 (CLJ); p. 181 (MLJ):

> [15] The plaintiff's claim that the IPA was executed without the plaintiff's approval at the general meeting cannot be sustained. The defendant was dealing with the plaintiff in good faith at all material times and was acting on the directors' resolution of the plaintiff. The defendant is well protected under the rule in *Turquand*'s case, *Royal British Bank v. Turquand* [1885] 5 E & E 248.
>
> [16] This rule has been succinctly stated by the Federal Court through the judgment Mohamad Azmi SCJ (as then was) in *Hew Sook Ying v. Hiw Tin Hee* [1992] 2 MLJ 189 at p. 199, in the following words:
>
> ... a person dealing with a company does not need to enquire into the regularity in the internal affairs and proceedings of the company and may assume that all is done regularly.

At para. [17], His Lordship continues:

> [17] By way of amplification, this rule prescribes that if a person deals in good faith with the board of directors or other representative body of a company which is in fact exercising powers of management and direction of its business and affairs, that person is not affected by defects of procedure within the company or by its failure to fulfil conditions which are required by the company's memorandum or articles to be fulfilled before the act or transaction in question is effected. The legal basis of the rule is that a person dealing with a company has no right to insist on proof by its directors that the provisions of its memorandum or articles have been complied with, and he cannot therefore be deemed to have constructive notice of some failure to comply which he has no means of discovering (*Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery* [1998] 1 Ch 629 at p. 636 per Lindley LJ).

[81] This court is in total agreement with the well established principles that persons dealing with a company in good faith need not inquire into the internal workings of a company. It is not incumbent upon a person to ensure that there are no defects of procedure within the company or that the powers of the directors were not being properly conducted. The general rule in *Turquand* applies to this case. It did not fall upon the 1st or 7th defendants to inquire into the internal workings of the plaintiff company. They were dealing with the 2nd defendant the managing director of the plaintiff company and the plaintiff's solicitors at all material times. The 1st and 7th defendants are entitled to rely upon the plaintiff's letter dated 10 July 2006 confirming and undertaking that no shareholders' resolution is necessary. It is also pertinent to add that the SPA is not invalid as the 2nd and 3rd defendant who executed it acted within the ambit of the Director's Circular Resolution passed on 10 April 2006 which subsequently ratified the act. This resolution is binding on the plaintiff; no evidence was produced to show that it had been annulled or had lapsed through effluxion of time. Even though the 1st and 7th defendants had notice of the fact that no shareholders' resolution was obtained, the court agrees with the reasons cited by learned counsel for the 1st defendant that they were in the circumstances, entitled to rely upon the plaintiff's letter of confirmation and undertaking to the contrary *(Chan Thiam Teng v. Ban Swee Heng Sdn Bhd, supra)*.

[82] On the totality of the evidence adduced at trial, the court is not satisfied that there is any evidence upon which to infer an intent of fraud or conspiracy on the part of the 1st to 7th defendants. There is no evidence of any agreement between the defendants to carry out the alleged fraud. Whilst their actions may not have been lawful, there is no element of fraud. Further, there is no evidence to show that the plaintiff suffered any loss. The purchase price for the land was not unusual in the circumstances as it is consistent with the value assessed by the Government Valuation Department. In addition, the purchase price had already been paid for in full. In the premises, the charge of fraud and conspiracy has not been made out beyond reasonable doubt. By reason of the foregoing, the question is answered in favour of the defendants.

Whether The Sale And Transfer Of The Land To The 1st Defendant Is Valid And Effective As It Was Effected During The Period After The Presentation Of A Winding-Up Petition And After A Winding-Up Order Had Been Made?

[83] The plaintiff case is that the events which took place after the winding-up petition was presented are unlawful, null and void. For ease of reference, the impugned events are highlighted in [ ] below.

4 January 2006	Winding-up petition was presented.
10 April 2006	[Directors' Circular Resolution passed.]
12 April 2006	[SPA dated.]
13 April 2006	Winding-up order made.
17 April 2006	[M/s AHZ delivers MOT to 7th defendant.]
17 May 2006	Stay order granted.
29 May 2006	[MOT executed by plaintiff.]
27 June 2006	[Transfer registered in favour of 1st defendant.]
20 September 2007	Stay order was set aside.
8 August 2008	Permanent stay order was granted on the winding-up order.

[84] Learned counsel for the plaintiff submitted that all the events from 4 January 2006 to 13 April 2006 including the transfer of the land to the 1st defendant are unlawful, null and void (ss. 219 and 223 Companies Act 1965; *Kimoyama Elektrik (M) Sdn Bhd v. Metrobilt Construction Sdn Bhd* [1990] 2 CLJ 795; [1990] 2 CLJ (Rep) 253; [1990] 3 MLJ 309; *Kredin Sdn Bhd v. Development & Commercial Bank Berhad* [1995] 4 CLJ 18 (CA)). The resolution of the plaintiff company authorising the sale is unlawful, null and void because once a company is wound-up the board of directors of the company becomes *functus officio*. The liquidator displaces the directors and the control and activities of the company is vested

with the liquidator (*American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506 (CA); *Inai Offshore & Marine Engineering Sdn Bhd v. Abdul Jalal Khalid* [2012] 2 CLJ 239). As the 7th defendant had knowledge of the winding-up order this knowledge ought to be imputed to the 1st defendant, the 7th defendant's client (*Oversea-Chinese Banking Corp Ltd v. Lee Tan Hwa & Anor & Another Case* [1989] 1 CLJ 458; [1889] 2 CLJ (Rep) 198; [1989] 1 MLJ 261).

[85] Learned counsel for the plaintiff also submitted that a stay order takes effect from the date it is granted. It is not retrospective. It does not cover events that took place before the date of the order. It does not cover the actions of the directors of the company before 17 May 2006 *(American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd, supra)*. Since the stay order was set aside on 20 September 2007, there was effectively no stay order. As such all events that took place after the stay order are rendered null and void. The 1st and 7th defendants were put on inquiry as to the winding-up order. These included the execution of the MOT, the registration of the transfer, the plaintiff's letter of undertaking dated 30 June 2006 signed by the 2nd defendant to OCBC, the plaintiff's letter dated 10 July 2006 signed by the 2nd defendant confirming and undertaking that no shareholders' resolution is necessary and the payment of RM4,776,750 by the 7th defendant into the client account of M/s AHZ. Since the 1st and 7th defendants were put on inquiry but failed to inquire, they cannot invoke the benefit of the *Turquand* rule (*Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793 (FC)).

[86] In reply, learned counsel for the 1st defendant submitted that it is not true that the 1st and 7th defendants failed to inquire about the winding-up order. After learning of the winding-up order, on 21 April 2006 the 7th defendant wrote to M/s AHZ inquiring whether sanction had been obtained by the liquidator or Official Receiver. On 24 April 2006 the 7th defendant made a winding-up search but the search report from the Insolvency Department Malaysia showed that the plaintiff company was not wound-up. On 4 May 2006, M/s AHZ wrote a letter to the Insolvency Department applying for sanction to proceed with the sale. On 8 May 2006, M/s AHZ enclosed a letter of consent/approval from the Insolvency Department dated 29 April 2006 to the 7th defendant. Azmi from the Insolvency Department testified

A that the letter is a forgery. Since the letter was sent by the plaintiff's own solicitors to the 7th defendant, the 1st and 7th defendants are not accountable or answerable for the forgery.

[87] It was also submitted that the effect of the permanent stay
B order on the winding-up order is to render the winding-up order inoperative permanently, as though there has been no winding-up order *(American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd, supra)*.

C

Decision

Effect Of Stay Order

[88] The Court of Appeal in *American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd, supra* has succinctly
D pronounced the principles on stay order. The court has no power to set aside, discharge or rescind a winding-up order but only to stay the winding-up order altogether or for a limited period upon such terms as the court deems fit. Once made, a winding-up order cannot be set aside, discharged or rescinded. The only remedy
E available is for a stay of proceedings (see *Re Baxters Limited* [1898] WN 60; *Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors* [1995] 2 CLJ 392; [1995] 1 MLJ 830 (CA); *Brinds Ltd v. Offshore Oil NL (No. 2)* [1985] 10 ACLR 232; and Ford, *Principles of Company Law*, (5th edn.), 1990, para 2207 at p. 770). Under
F s. 243(1) of the Companies Act 1965, the court is empowered to make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the court thinks fit. There is no express provision under the Companies Act 1965 and the Companies (Winding-Up) Rules 1972 empowering the court to
G set aside, or discharge or rescind a winding-up order. A party may, however, appeal against the winding-up order under s. 253 of the Act or apply to stay the proceedings under s. 243. A stay order under s. 243 of the Act takes effect from the date of pronouncement of the stay and not from the date of the winding-
H up order. In other words, a stay does not set aside or annul the winding-up order. The stay order only takes effect from the date of the stay order. Proceedings are not ended by a stay though nothing can be done to pursue them without further court order. *In Re Kim Maxwell Ltd* [1992] 1 NZLR 69 Tipping J once said

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that 'a permanent stay amounts in reality to a contradiction in terms: the winding up remains but is permanently stayed'. In other words, the effect of a stay order is that the winding-up process comes to an end – the whole effect of the winding-up ceases and the company can thereafter resume the conduct of its business and affairs as if no winding-up order existed.

[89] Applying the aforesaid principles to the present case, as a consequence of the permanent stay order dated 8 August 2008 the whole effect of the winding-up ceases and the plaintiff company can thereon carry on its business activities and operations as if no winding-up order existed. How does this affect the impugned events? To answer this question, it is necessary to return to the basic principle relating to stay orders. It is this – a stay order only becomes operative from the date of the stay order. In other words, a stay order has no retrospective effect. It only takes effect from the date it was made. Accordingly, the effect of the permanent stay order is this – from 8 August 2008 onwards the plaintiff company may carry on its business and operations as if no winding-up order had been made. The operative words are 'as if no winding-up order existed'. It does not mean that the winding-up order never existed or that the winding-up order has been set aside or revoked. The winding-up order is still in existence. It only became inoperative from 8 August 2008 onwards. In short, the permanent stay order relates only to events which were transacted by the plaintiff company from 8 August 2008 onwards. It does not relate back to events which took place prior to 8 August 2008.

[90] By reason of the foregoing, the court holds that the permanent stay order does not relate to the impugned events which transpired before 8 August 2008. Consequently, the impugned events are illegal null and void for being made after the commencement of the winding-up by the court under s. 223 of the Act. It must therefore follow that the SPA and transfer of the land to the 1st defendant is void as it was effected during the period after the presentation of the winding-up petition and after the winding-up order had been made.

A **Concluding Remarks**

[91] In the light of the above findings, this court will make the following orders. There will be no order for interest or for damages to be assessed on the 1st defendant's counterclaim as
B the impugned events are illegal null and void. The court hereby orders that:

(1) the claim against the 4th defendant is dismissed with costs of RM10,000;

C (2) the claim against the 5th defendant is dismissed with costs of RM10,000;

(3) the claim against the 2nd, 3rd and 6th defendants is dismissed with no order as to costs;

D (4) the claim against the 7th defendant is dismissed with costs of RM12,000;

(5) the claim against the 1st defendant is allowed on the following terms:

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(i) a declaration that the land was unlawfully transferred to the 1st defendant and the transfer is invalid and of no effect;

F (ii) subject to the full refund of the purchase price of RM12,087,000 under item 6(a) by the plaintiff to the 1st defendant, and payment to the 1st defendant of the improvement and infrastructure under 6(b), if any, such amounts to be assessed by the Deputy Registrar, an order directing the Registrar/Land Administrator, Johor to cancel
G the MOT and to replace the name of the plaintiff as the proprietor of the land;

(iii) an injunction to restrain the 1st defendant or their agents or servants from dealing with the land by way of transfer
H or in any manner whatsoever;

(iv) damages to be assessed by the Deputy Registrar;

(v) liberty to apply; and

I (vi) costs of RM30,000.

(6) in respect of the 1st defendant's counterclaim,

(a) the plaintiff refund to the 1st defendant the purchase price of RM12,087,000; and

(b) the plaintiff reimburse the 1st defendant for the value of the improvement and infrastructure, if any, made to the land, such amount to be assessed by the Deputy Registrar.